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Cantona Lim Xiang Kim v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-09–415–10 OF 2017
TENGKU MAIMUN, YAACOB MD SAM AND ZABARIAH MOHD JJCA
18 MARCH 2019

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Road Traffic — Dangerous driving — Causing death — Appellant convicted and sentenced by High Court for the offence of reckless or dangerous driving — Appellant appealed against High Court's decision — Whether charge against appellant bad in law — Whether High Court failed to apply objective test in determining if appellant's dangerous driving offence under s 41(1) of the Road Traffic Act — Road Traffic Act 1987 s 41(1)

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The appellant was charged in the magistrates court at Kuching for the offence under s 41(1) of the Road Transport Act 1987 ('the Act') for causing the death of Unus bin Alek ('the deceased') by reckless or dangerous driving. The appellant claimed trial. At the conclusion of the trial, the magistrate found the appellant guilty and convicted him. The accused was sentenced to three years imprisonment and a fine of RM6,000 in default of six months imprisonment. The magistrate further ordered that his driving license suspended and particulars of the offence endorsed on the driving license. The appellant then appealed against the conviction and sentence to the High Court whilst the prosecution cross-appealed against inadequacy of sentence. The High Court dismissed the appeal against conviction but allowed the appeal against sentence. The appeal by the prosecution was dismissed. Pending appeal, the custodial sentence was stayed. Dissatisfied with the conviction and sentence, the appellant then applied for and obtained leave to appeal to the present court. The appellant submitted the following grounds: (a) the High Court and magistrates court failed to find that the charge was bad in law as the defence of the appellant that he lost control of his car which caused the accident was erroneously and illegally imported into the charge; and (b) the High Court and magistrates court failed to apply an objective test in determining whether the appellant was driving in a manner that was dangerous to constitute an offence under s 41(1) of the Act.

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Held:

(1) There was no merit on the ground that a bad charge was framed. The submission of the prosecution that the incorporation of the offence under s 41(1) of the Act had not occasioned a failure of justice to the

appellant. Neither had the appellant been misled in his defence. There was no reason to interfere with the findings of the High Court that the charge had informed the appellant with certainty and accuracy and that even if there was any error or omission, it was curable under s 422 of the Criminal Procedure Code (see para 22).

(2) The defence of the appellant that his vision was impaired due to the splashed water into his windscreen which was caused by another car which overtook the appellant prior to the accident, was not challenged by the prosecution. The magistrate and learned judicial commissioner failed to give sufficient consideration to the fact that the obvious and serious risk which resulted in the death of the deceased was not caused solely by the appellant. There was an intervening cause which contributed to the death of the deceased and when viewed objectively, could not be said to be the fault of the appellant (see para 27).

(3) Apart from the fact that the accused had collided into, and caused the death of the deceased, no other evidence was led to show the recklessness of the accused. The prosecution needed to show that the accused was driving in a manner which showed a selfish disregard for the safety of other road users. This element was conspicuously absent in the prosecution's case. The essential ingredients of recklessness under s 41(1) of the Act had not been proved beyond reasonable doubt by the prosecution. The appellant was convicted of driving without due care and attention or without reasonable consideration under s 43(1) of the Act. The court allowed the appeal; set aside the conviction and sentence by magistrate court and High Court and substituted for conviction under s 43(1) of the Act and fine of RM10,000 in default three months imprisonment imposed to the appellant (see paras 28–31).

[Bahasa Malaysia summary

Perayu dituduh di mahkamah majistret di Kuching atas kesalahan di bawah s 41(1) Akta Pengangkutan Jalan 1987 ('Akta') yang menyebabkan kematian Unus bin Alek ('si mati') oleh pemanduan yang melulu atau berbahaya. Perayu menuntut untuk dibicarakan. Pada akhir perbicaraan, majistret mendapati perayu bersalah dan mensabitkannya. Tertuduh dihukum penjara tiga tahun dan dikenakan denda sebanyak RM6,000 jika gagal membayar enam bulan penjara. Majistret selanjutnya memerintahkan bahawa lesen memandu beliau digantung dan butir-butir kesalahan diindorskan pada lesen memandu. Perayu kemudiannya merayu terhadap sabitan dan hukuman ke Mahkamah Tinggi sementara pihak pendakwaan merayu terhadap kekurangan hukuman. Mahkamah Tinggi menolak rayuan terhadap sabitan tetapi membenarkan rayuan terhadap hukuman. Rayuan oleh pihak pendakwaan telah ditolak. Sementara rayuan belum selesai, hukuman penjara digantung. Tidak berpuas hati dengan sabitan dan hukuman, perayu kemudian memohon dan mendapat kebenaran untuk merayu ke mahkamah ini. Perayu mengemukakan

alasan-alasan berikut: (a) Mahkamah Tinggi dan mahkamah majistret gagal untuk mendapati bahawa pertuduhan itu adalah salah di sisi undang-undang kerana pembelaan perayu bahawa dia kehilangan kawalan terhadap keretanya yang menyebabkan kemalangan itu adalah salah dan dimasukkan secara salah ke dalam pertuduhan; dan (b) Mahkamah Tinggi dan mahkamah majistret gagal menggunakan ujian objektif dalam menentukan sama ada perayu sedang memandu dengan cara yang berbahaya untuk menjadi suatu kesalahan di bawah s 41(1) Akta.

Diputuskan:

(1) Tiada merit atas alasan bahawa pertuduhan cacat telah dirangka. Hujahan pendakwaan bahawa kemasukan kesalahan di bawah s 41(1) Akta tidak menyebabkan kegagalan keadilan kepada perayu. Perayu juga tidak tersalah arah dalam pembelaannya. Tidak ada alasan untuk mengganggu penemuan Mahkamah Tinggi bahawa pertuduhan telah memaklumkan perayu dengan pasti dan ketepatan dan bahawa walaupun terdapat sebarang kesilapan atau peninggalan, ia dapat diperbaiki di bawah s 422 Kanun Tatacara Jenayah (lihat perenggan 22).

(2) Pembelaan perayu bahawa penglihatannya terganggu kerana percikan air ke cerminnya yang disebabkan oleh kereta lain yang memotong perayu sebelum kemalangan itu, tidak dicabar oleh pihak pendakwaan. Majistret dan pesuruhjaya kehakiman yang bijaksana gagal memberikan pertimbangan yang mencukupi kepada hakikat bahawa risiko yang jelas dan serius yang mengakibatkan kematian si mati tidak semata-mata disebabkan oleh perayu. Terdapat satu sebab campur tangan yang menyumbang kepada kematian si mati dan apabila dilihat secara objektif, tidak dapat dikatakan sebagai kesalahan perayu (lihat perenggan 27).

(3) Selain hakikat bahawa tertuduh telah bertembung, dan menyebabkan kematian si mati, tiada bukti lain yang menunjukkan perbuatan melulu tertuduh. Pihak pendakwaan perlu menunjukkan bahawa tertuduh memandu dengan cara yang menunjukkan kecenderungan yang tidak wajar untuk keselamatan pengguna jalan raya yang lain. Unsur ini tidak kelihatan dengan jelas dalam kes pendakwaan. Unsur penting, iaitu perbuatan melulu di bawah s 41(1) Akta tidak dibuktikan melampaui keraguan munasabah oleh pihak pendakwaan. Perayu telah disabitkan dengan memandu tanpa penjagaan dan perhatian yang sewajarnya atau tanpa pertimbangan yang munasabah di bawah s 43(1) Akta. Mahkamah membenarkan rayuan itu; mengetepikan sabitan dan hukuman oleh mahkamah majistret dan Mahkamah Tinggi dan menggantikan hukuman di bawah s 43(1) Akta dan denda RM10,000 jika gagal penjara tiga tahun dikenakan kepada perayu (lihat perenggan 28–31).]

Cases referred to

An Thang Sang v PP; Choong Sze Foong v PP [1975] 1 MLJ 204 (refd)
Davendar Singh a/l Sher Singh v Pendakwa Raya [2012] MLJU 321; [2012] 1 LNS 261, CA (refd)
Hamit bin Matusin & Ors v Penguasa Tanah dan Survei & Anor and another appeal [2006] 3 MLJ 289, HC (refd)
Lim Chin Poh v PP [1969] 2 MLJ 159 (refd)
PP v Ahmad Firdaus bin Zulkifli [2017] 3 MLJ 492, CA (refd)
PP v Lee Hong Kee [1969] 2 MLJ 60 (refd)
PP v Ong Kia Chan [2006] 7 MLJ 230, HC (refd)
PP v Zulkifli bin Omar [1998] 6 MLJ 65, HC (folld)
R v Gosney [1971] 3 All ER 220, CA (refd)
Ramiah v PP [1972] 2 MLJ 258 (folld)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363, FC (refd)

Legislation referred to

Criminal Procedure Code s 422
Road Traffic Ordinance 1958 s 34A
Road Transport Act 1987 ss 41(1), 43(1), (2)

Appeal from: Criminal Appeal No KCH-41S-2/1 of 2017 (High Court, Kuching)

Shankar RP Asnani (Daniel CL Ling with him) (Thomas, Shankar Ram & Co) for the appellant.
Mohd Taufik bin Mohd Yusoff (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant ('the accused') was charged in the Magistrates Court at Kuching for an offence under s 41(1) of the Road Transport Act 1987 ('the Act') for causing the death of Unus bin Alek ('the deceased') by reckless or dangerous driving. The charge against the accused reads:

> Bahawa kamu pada 16.11.2014 jam lebih kurang 06.00 petang di Jalan Batu Kawa, di daerah Kuching dalam Negeri Sarawak sebagai pemandu motorkar nombor pendaftaran QBC4445 jenis Proton Saga, telah memandu dengan cara yang setelah mengambil perhatian segala hal keadaan adalah merbahaya kepada orang awam iaitu semasa bergerak lurus telah hilang kawalan lalu masuk kelaluan bertentangan dan melanggar dengan (2) buah motosikal jenis Modenas Kriss nombor pendaftaran QAD7682, motosikal jenis SYM BX110 nombor pendaftaran QAA3847H dan motorkar jenis BMW nombor pendaftaran QSH7623 yang bergerak dari arah laluan hingga menyebabkan kematian kepada mangsa yang bernama Unus bin Alek (L) KPT: 570410-13-5173 dan oleh yang demikian kamu

telah melakukan kesalahan di bawah seksyen 41(1) Akta Pengangkutan Jalan 1987 dan boleh dihukum di bawah Akta yang sama.

[2] The accused claimed trial. At the conclusion of the trial, the magistrate found the accused guilty and convicted him as charged. The accused was sentenced to three years imprisonment, the sentence to commence from the date of conviction, and a fine of RM6,000 in default six months imprisonment. The magistrate further ordered that his driving licence be suspended and particulars of the offence be endorsed on the driving licence.

[3] It was the finding of the magistrate that the accused was driving at an excessive speed prior to the accident, such that he lost control of the car, hit the road divider and crossed onto the opposite lane resulting in the collision with two motorcycles, and the death of the deceased. The magistrate further found that the accused, while driving, had failed to take into consideration the condition of the road and the amount of the traffic expected on the road and thus, had created a dangerous situation. The magistrate held, inter alia:

> 6 ... Knowing that the (sic) it was drizzling as testified by the witnesses which court was clearly in doubt it will again creates (sic) a pool or puddles of water that the accused claimed had caused a splash onto his windscreen and resulted to his temporary loss of vision as he alleged. He should have took (sic) into consideration that the road is wet and extra precaution should be taken into consideration when driving in such situation.
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> ...
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> 8 Having directed my mind on the evidence both for and against the prosecutions and the evidence of the defence presented before me and based on my above reasoning, I have asked myself is there sufficient evidence to convict the Accused even if he elects to remain silent when defence is called: and the answer is clearly in the positive. Defence has fail to raise any reasonable doubt against the Prosecution's case.
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> 9 Accordingly I hereby convict the accused person of the charge preferred against him.

[4] Aggrieved, the accused appealed to the High Court against both conviction and sentence whilst the prosecution cross-appealed against inadequacy of the sentence.

[5] The High Court dismissed the accused's appeal against conviction but allowed his appeal against sentence. The term of imprisonment was reduced from three years to two years and the fine was maintained. The appeal by the prosecution was dismissed. Pending appeal, the custodial sentence was stayed.

[6] At the High Court, the accused's complaints were:

A (a) that the charge against him was wrongly framed and was bad in law; and

(b) that the magistrate had mangled the issues of actus reus and mens rea which should be dealt with objectively.

B On the first issue, learned counsel submitted that the defence of the accused that he had lost control of his car and had caused the accident, had been erroneously and illegally imported into the charge. Thus, the charge was an embarrassment and had caused confusion to him.

C **[7]** On the second issue, learned counsel contended that the accused should not have been found guilty of dangerous driving. It was the defence of the accused that the accident occurred because there was a splashing of water on his windscreen caused by another car. This had impaired his vision on the road and consequently, had caused him to lose control of his car. In response, the D prosecution argued that the magistrate had, in fact, directed his mind in deciding whether the accused had committed the act of dangerous driving. It was the finding of the magistrate that the accused was speeding and due to the excessive speed, the car hit the road divider and flew to the opposite lane and E caused the death of the deceased which fact was never challenged or denied by the defence.

[8] On the first issue, the learned judicial commissioner agreed with the prosecution that the charge had informed the accused with certainty and F accuracy and that any errors or omissions in the charge, if any, were curable under s 422 of the Criminal Procedure Code.

[9] On the second issue, the learned judicial commissioner found that the magistrate was correct when he held that the accused was at fault by driving at G an excessive speed and by failing to take into consideration the weather, the nature and the size of the road.

[10] Having found no merits in the appeal, the learned judicial commissioner dismissed the appeal by the accused against conviction but H allowed his appeal against sentence as adverted to in para [5].

[11] Dissatisfied with the conviction and sentence, the accused applied for and obtained leave to appeal to this court on the following question:

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> Whether the charge under Section 41(1) of Road Transport Act 1987 can import into the body of the charge the Defence of an Accused that while driving straight he lost control of the Motorcar (through no fault of the driver or through intervening cause) when such are not ingredients of Section 41(1).

THE APPEAL

[12] The accused canvassed the following issues before us:

(a) that the High Court and the magistrates court erred in failing to find that the charge was bad in law when the defence of the accused that he lost control of his car which caused the accident was erroneously and illegally imported into the charge; and

(b) that the High Court and the magistrates court erred in failing to apply an objective test in determining whether the accused was driving in a manner that was dangerous to constitute an offence under s 41(1) of the Act.

[13] In respect of the first issue, relying on the case of *Lim Chin Poh v Public Prosecutor* [1969] 2 MLJ 159, learned counsel submitted that there are three distinct offences laid out in s 41(1) of the Act, namely:

(a) causing death by driving a motor vehicle on the road recklessly;

(b) causing death by driving a motor vehicle on the road at a speed which is dangerous to the public etc; and

(c) causing death by driving a motor vehicle on the road in a manner which is dangerous to the public etc.

[14] It was further submitted that the accused appeared to be charged under the third limb of the section ie driving in a manner having regard to all circumstances which is dangerous to the public and causing death. The charge preferred against the accused reads '... semasa bergerak lurus telah hilang kawalan lalu masuk kelaluan bertentangan dan melanggar ...' instead of '... driving ... in a manner having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) dangerous to the public ...'. Learned counsel contended that the words 'hilang kawalan' were completely strange to s 41(1) of the Act and constituted a complete defence to the accused. The charge was thus bad in law.

[15] As regards the second issue that the intervening cause should be dealt with objectively and properly, which relates to the issue of mens rea and actus reus, learned counsel submitted that it was an unchallenged fact that the accused had lost control of his car when another car overtook him from the left and had caused water to be splashed onto his windscreen which impaired his vision on the road. At that material time, he was driving straight along a familiar road at about 70km/h. As such, this could not constitute an offence under the third limb of s 41(1) of the Act. By the intervening cause ie water splashing onto his windscreen, the accused could not and did not create any

dangerous situation, nor was the accused at fault.

[16] Learned counsel contended that the learned judicial commissioner failed to appreciate that to prove a dangerous driving under s 41(1), the prosecution must establish strictly that:

(a) a dangerous situation was created by the accused, which is an objective test; and

(b) when creating such a situation, the accused was at fault, which also requires an objective assessment.

[17] Learned counsel further contended that the offence under s 41(1) of the Act has not been made out, particularly when the prosecution failed to establish the speed range of the accused's car at the material time. It was however conceded that the facts support a lesser offence under s 43(1) of the Act.

[18] In opposing the appeal, it was argued by the prosecution that the extra facts incorporated into the body of the charge though not an ingredient of the charge, was to give the accused sufficient notice for purposes of preparing his defence. The incorporation of the extra facts was a mere irregularity which did not occasion any failure of justice and was curable under s 422 of the Criminal Procedure Code. There was no failure of justice as the accused was able to meet the charge by adducing evidence to mount his defence ie that water had splashed onto his windscreen due to a car overtaking him from the left lane which caused him to cross the road divider onto the opposite direction. He was also able to put forward the defence of automatism.

OUR DECISION

[19] As a matter of principle, an appellate court will not intervene with a decision of a trial court with whom the law entrusts the primary task of evaluating the evidence. The appellate court would only intervene if it is convinced that there was no judicial appreciation by the trier of fact of the evidence adduced at the trial and that the trial court was shown to be plainly wrong in arriving at its decision (see *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; *Hamit bin Matusin & Ors v Penguasa Tanah dan Survei & Anor and another appeal* [2006] 3 MLJ 289; *Public Prosecutor v Ahmad Firdaus bin Zulkifli* [2017] 3 MLJ 492).

[20] In *Davendar Singh a/l Sher Singh v Pendakwa Raya* [2012] MLJU 321; [2012] 1 LNS 261, Azahar Mohammed JCA (as he then was) had this to say on appellate intervention (at p 6):

> [9] ... Nonetheless, it would be open to us to upset the findings made by a trial judge if such a finding is not supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection in law or the trial court has fundamentally misdirected itself. In this regard, judicial appreciation and evaluation of evidence is at the heart of the duty of the learned trial judge. It is the duty of the learned trial judge to undertake a positive evaluation of the evidence, which includes a careful analysis of the credibility and reliability of the witnesses for the prosecution (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301). It is also his duty to consider the entire evidence presented before him, including the evidence which favours the defence. On what constitutes judicial appreciation of evidence, it is apt to bear in mind the following words of Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin v Gan Yook Chin* [2003] 2 MLJ 97:
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> > A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[21] The accused had, in his defence, explained the reason why he lost control of his motorcar at the material time which eventually caused the death of the deceased. In essence, his defence was that the accident happened because he lost control of his car when another car overtook him from the left, caused the water on the road to splash on his windscreen and impaired his vision. The accused was thus able to respond to the charge against him.

[22] As such, we find no merit on the first ground canvassed by the accused. We agreed with the submission of the prosecution that the incorporation of '... iaitu semasa bergerak lurus telah hilang kawalan lalu masuk kelaluan bertentangan ...' in the charge against the accused for an offence under s 41(1) of the Act has not occasioned a failure of justice to the accused. Neither has the accused been misled in his defence (see *Public Prosecutor v Ong Kia Chan* [2006] 7 MLJ 230; *Public Prosecutor v Lee Hong Kee* [1969] 2 MLJ 60). We therefore found no reason to interfere with the findings of the learned judicial commissioner that the charge had informed the accused with certainty and accuracy and that even if there was any error or omission, it was curable under s 422 of the Criminal Procedure Code.

[23] In respect of the second issue, s 41(1) of the Act provides:

> 41(1) Any person who, by the driving of a motor vehicle on a road *recklessly* or *at a speed* or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) *is dangerous to the public*, causes the death of any person shall be guilty of an offence and shall on conviction be punished with imprisonment for a term of not less than two years and not more than ten years and to a fine not less than five thousand ringgit and not more than twenty thousand ringgit. (Emphasis added.)

[24] The accused was charged under the third limb of s 41(1) of the RTA ie for the offence of causing death by driving in a manner which is dangerous to the public. There are no dearth of authorities on what constitutes 'dangerous driving' under s 41(1) of the Act. In *Ramiah v Public Prosecutor* [1972] 2 MLJ 258, a case under s 34A of the Road Traffic Ordinance 1958 which is the antecedent of s 41(1) of the Act, Raja Azlan Shah J (as His Majesty then was) observed that:

> It is not the law under s 34A of the Road Traffic Ordinance that merely because an accident had happened and a person had been killed, danger had in that sense arisen and therefore it must follow, as the night, the day, that the appellant was driving in a manner dangerous to the public.

Adopting the principles laid down in the case of *R v Gosney* [1971] 3 All ER 220, His Lordship further said:

> ... In a case under section 34A, two things must be established. First, there must be a situation created by the accused which, viewed objectively, is dangerous. Dangerous driving is not defined in the Road Traffic Ordinance and it is up to the court to come to a decision on the evidence ...
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> ...
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> Secondly, the prosecution must prove that when creating such a situation the appellant must be at fault. 'Fault involves a failure; a falling below the care and skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances'.

[25] Ong CJ (Malaya) in the case of *An Thang Sang v Public Prosecutor; Choong Sze Foong v Public Prosecutor* [1975] 1 MLJ 204, while commenting on the case of *Ramiah v Public Prosecutor* [1972] 2 MLJ 258 said (at p 205):

> ... What really matters is the principle of law enunciated in *Ramiah*, namely, that driving is not necessarily dangerous because it leads to fatal consequences, but that a verdict of guilt can only follow a finding of fault on the part of the driver.

[26] Guidance can also be found in *Public Prosecutor v Zulkifli bin Omar*

[1998] 6 MLJ 65 where Vincent Ng J said (at p 71):

> The dictum of Lawton LJ in the English Court of Appeal decision in the celebrated case of *R v Guilfoyle* [1973] 2 All ER 844 — which concerned a lorry driver who was convicted of causing death by dangerous driving — is illuminating. He had this to say (at p 845):
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> > Cases of this kind (causing death by dangerous or reckless driving) fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment (hereafter called 'the first category'), and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness (hereafter called 'the second category').
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> This distinctive categorisation of dangerous driving was discussed with ready approval by Ong CJ (Malaya) in the cases of *Tan Thang Sang v PP; Choong Sze Foong v Public Prosecutor* [1975] 1 MLJ 204. See also *R v Boswell and other appeals* [1984] 3 All ER 353 (CA). And more recently, in 1993 this categorisation was also adopted in my decision in *Goh Kheng Seong v Public Prosecutor* [1993] 1 MLJ 103.
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> It is precisely in recognition of this distinction between the two categories of offences under s 41(1) for 'causing death by reckless or dangerous driving' that the Legislature has, in all its wisdom, made express provision under s 41(4) that:
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> > The court may upon the trial of a person for an offence under this section (s 41(1)) convict such person of an offence under s 42 (dangerous and reckless driving but without causing death) or s 43 (driving without due care and attention or without reasonable consideration).
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> As Parliament has not spelt out the meaning of 'driving dangerously' or 'driving recklessly' it is left to the courts to do so. To be guilty of the more serious category of the offence of reckless driving the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it.
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> ...
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> In an offence under s 41(1), excessive speed is not the sole decider of reckless driving but there must also be a finding on the manner and other aspects of the defendant's driving which constituted recklessness, by having regard to the prevailing circumstances at the material time of accident, including the nature, condition, and size of the road, and the amount of traffic which is or might be expected on the road. The risk created by the manner in which the vehicle is driven must be both obvious and serious, and the court has to be satisfied that the essential or core ingredients of recklessness have been proved beyond reasonable doubt.

[27] Applying the principles in the above cases and looking at the prosecution's case as well as the defence of the accused as a whole, we found that the learned judicial commissioner fell into error in upholding the findings of the magistrate. The defence of the accused that his vision was impaired due to

the splash of water onto his windscreen which was caused by another car which overtook him prior to the accident, was not challenged by the prosecution. The magistrate and the learned judicial commissioner failed to give sufficient consideration to the fact that the obvious and serious risk which resulted in the death of the deceased was not caused solely by the accused. There was an intervening cause which contributed to it and when viewed objectively, could not be said to be the fault of the accused.

[28] Apart from the fact that the accused had collided into, and caused the death of the deceased, no other evidence was led to show the recklessness of the accused. As propounded in *Ramiah*, it is not the law that merely because an accident happened which led to fatal consequences, it follows that the appellant was driving in a manner dangerous to the public. The prosecution needed to show something more, ie that the accused was driving in a manner which has shown a selfish disregard for the safety of other road users. This element was conspicuously absent in the prosecution's case. In our judgment, the essential or core ingredients of recklessness under s 41(1) of the Act have not been proved beyond reasonable doubt by the prosecution.

[29] However, we found that the prosecution had established a case against the accused for driving without due care and attention or without reasonable consideration, an offence under s 43(1) of the Act. For ease of reference, s 43(1) is reproduced below:

> 43 Careless and inconsiderate driving
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> (1) A person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and shall on conviction be punished with a fine of not less than four thousand ringgit and not more than ten thousand ringgit and shall also be liable to imprisonment for a term not exceeding twelve months.

CONCLUSION

[30] For the above reasons, we allowed the appeal. We set aside the conviction and sentence passed by the magistrate which was affirmed by the learned judicial commissioner and substituted for a conviction under s 43(1) of the Act.

[31] Having heard the parties on mitigation, we sentenced the accused to a fine of RM10,000 in default three months' imprisonment. We ordered that the particulars of such conviction be endorsed on the accused's driving license pursuant to s 43(2) of the Act.

Order accordingly.

Reported by Mohd Kamarul Anwar